

ESTTA Tracking number: **ESTTA954300**

Filing date: **02/14/2019**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92066968
Party	Defendant Software Freedom Conservancy
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Attachments	Reply on Motion for Reconsideration final.pdf(324218 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Software Freedom Law Center,	)	
	)	
Petitioner,	)	
	)	
v.	)	Cancellation No.
	)	92066968
Software Freedom Conservancy,	)	
	)	
Respondent.	)	
	)	

**RESPONDENT’S REPLY BRIEF ON ITS REQUEST FOR RECONSIDERATION  
OF THE BOARD’S DENIAL OF SUMMARY JUDGMENT**

The Board erred when it prematurely denied the Respondent’s Motion for Summary Judgment. Because Petitioner never filed an opposition to the motion, there were no disputed facts that would preclude entry of summary judgment. Therefore, there was simply no basis for the Board to reject the motion.

Federal Rule of Civil Procedure 56<sup>1</sup> states:

(c) Procedures.

(1) Supporting Factual Positions. *A party* asserting that a fact cannot be or is genuinely disputed must support the assertion by:

- (A) citing to particular parts of materials in the record ...; or
- (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

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<sup>1</sup> Fed.R.Civ.P. 56 is made applicable to proceedings before the board by 37 C.F.R. § 2.116(a).

Fed. R. Civ. P. 56(e) (emphasis added). The Federal Circuit elaborated:

Where a movant has supported its motion with affidavits or other evidence which, unopposed, would establish its right to judgment, the non-movant may not rest upon general denials in its pleadings or otherwise, but must proffer countering evidence sufficient to create a genuine factual dispute. ... This court has delineated the non-moving party's duty in this respect, as follows:

In countering a motion for summary judgment, more is required than mere assertions of counsel. The non-movant may not rest on its conclusory pleadings but, under Rule 56, must set out, usually in an affidavit by one with knowledge of specific facts, what specific evidence could be offered at trial.

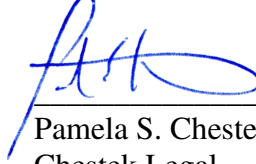
*Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1562 (Fed. Cir. 1987)

(ellipses added; internal citations omitted). It is only after the matter is fully briefed that the Board, in weighing the parties' arguments, draws all inferences in the non-moving party's favor. The inference does *not* mean the non-moving party is entirely relieved of its duty to come forward with argument and evidence.

The moving party, Respondent, filed a motion for summary judgment on its affirmative defenses and supported that motion with substantial evidence. The non-moving party, Petitioner, did not proffer any countering evidence sufficient to create a general factual dispute. That is not because Petitioner conceded or declined to file a responsive brief, but because the Board never gave the Petitioner an opportunity to respond. It was entirely improper for the Board to deny summary judgment by hypothesizing that Petitioner might submit relevant evidence that would create a genuine issue of material fact. Instead, the law requires that the non-moving party be put to its proof.

The Registrant therefore asks that the Board withdraw the denial of the Respondent's Motion for Summary Judgment and allow the motion to be fully briefed by both parties. Only at that point may the Board decide whether summary judgment is appropriate.

SOFTWARE FREEDOM  
CONSERVANCY



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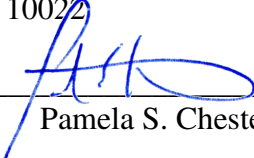
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon Petitioner this 14<sup>th</sup> day of February 2019, by emailing a copy thereof to Petitioner's counsel at [mishi@softwarefreedom.org](mailto:mishi@softwarefreedom.org) and [smcmahon@ostrolenk.com](mailto:smcmahon@ostrolenk.com).

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